

BEFORE THE POLLUTION CONTROL HEARINGS BOARD
STATE OF WASHINGTON

EDWARD R. ESTER d/b/a/ WARD
APARTMENTS, and OLYMPIAN
APARTMENTS,

Appellant,

v.

PUGET SOUND AIR POLLUTION CONTROL
AGENCY,

Respondent.

PCHB Nos. 88-173 & 88-174

ORDER DISMISSING APPEALS

This matter, the appeal of civil penalties for the alleged unlawful burning of waste-derived fuels came before the Board on respondent's Renewed Motion to Dismiss on May 16, 1989, in Seattle, Washington. The matter was heard by Board members Wick Dufford (presiding) and Harold S. Zimmerman. The proceedings were reported by Cheri L. Davidson.

Appellant was represented by Michael L. Olver, attorney at law.
Respondent was represented by Keith D. McGoffin, attorney at law.

1 Witnesses were sworn and testified. Exhibits were admitted and
2 examined. From the testimony heard and evidence examined, the Board
3 makes the following

4 FINDINGS OF FACT

5 I

6 Notice and Order of Civil Penalty Nos. 6898 and 6901, dated
7 October 24, 1988, assess an aggregate of \$2,000 against appellant for
8 the alleged unlawful burning of waste-derived fuel at two separate
9 apartment buildings in Seattle on or about July 28, 1988.

10 The penalty notices were issued by the Puget Sound Air Pollution
11 Control Agency (PSAPCA), which sought to effect personal service on
12 Edward R. Ester by use of a legal messenger service.

13 The record does not disclose that any attempt was made to impose
14 the penalties through giving notice by certified mail.

15 II

16 Notices of appeal relating to the penalties were filed with the
17 Pollution Control Hearings Board on November 23, 1988, and
18 consolidated for hearing under cause numbers PCHB No. 88-173 and PCHB
19 No. 88-174.

20 The appeals were not served upon PSAPCA. That agency learned of
21 the existence of the appeals on November 29, 1988, or thereafter, when
22 it received a letter from the Pollution Control Hearings Board
23 acknowledging the hearings board's receipt of the appeals.
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25
26 ORDER OF DISMISSAL
27 PCHE Nos. 88-173 & 88-174

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III

On December 5, 1988, respondent filed a Motion to Dismiss for failure to serve the appeals on PSAPCA. After reviewing opposing argument and counter affidavits the Board by an order dated January 20, 1989, declined to dismiss.

The record then did not show that the penalty notices had been properly served upon appellant, either by certified mail or by personal service. Under the circumstances, the Board concluded that it could not be determined when the 30 day appeal period began.

IV

On February 11, 1989, PSAPCA filed a Renewed Motion to Dismiss with an affidavit of service regarding the penalty notices. A counter affidavit was again filed in response. The Board decided that the motion involved an issue of credibility, requiring live testimony, and set the matter for hearing on May 16, 1989.

The hearing was held and, thereafter, briefs were submitted, the last being received on June 6, 1989.

V

On October 28, 1988, a process server retained by PSAPCA attempted to serve the penalty notices on Ester at his home but found no one there.

The process server returned to Ester's home at about 7:30 a.m. on

1 October 29, 1988. He knocked on the door and could hear the Esters'
2 dogs barking inside the house.

3 From inside the house, Mrs. Ester heard the process server
4 approach the house. She called out through the door asking him what
5 he was doing there. He said he had legal papers for Edward R. Ester.
6 At that point Mr. Ester, overhearing the conversation, shouted through
7 the door for the messenger to "beat it."

8 We are persuaded that the Esters then knew who the process server
9 was and what he was trying to accomplish. But they chose not to open
10 their door. So the messenger left the penalty notices by the door,
11 shouted, "You have been legally served," and departed.

12 Later in the day, Mr. Ester found the penalty notices on the lawn
13 near his porch. He read them and took them to his attorney.

14 V

15 Ester's notices of appeal were on their face directed to the
16 "Clerk of the Board, Pollution Control Hearings Board." Nothing on
17 those documents themselves indicates that they were also intended to
18 be served on PSAPCA.

19 Ester's counsel gave the appeal notices to the same legal
20 messenger service PSAPCA had used to serve the penalty notices on
21 Ester. The instructions for service, dated November 23, 1988, call
22 for delivery to be made to the "Clerk of the Board," followed by an
23 address from which the Pollution Control Hearings Board moved some ten
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1 years ago. Next to this in a different hand, is written, "Puget Sound
2 Air Pollution Control Agency."

3 The obsolete address for this Board is lined through, as is
4 "Puget Sound Air Pollution Control Agency." Underneath is written,
5 "Pollution Control Hearings Board" and the current address is given.

6 From the instructions document it is impossible to tell whether
7 the writings in different hands were made contemporaneously, and when
8 or why lines were drawn through some entries. No address for PSAPCA
9 appears on the form at all.

10 VI

11 Any Conclusion of Law which is deemed a Finding of Fact is hereby
12 adopted as such.

13 From these Findings of Fact, the Board comes to these

14 CONCLUSIONS OF LAW

15 I

16 Pursuant to RCW 43.21B.300(1) and PSAPCA's Regulation I, Section
17 3.29(d) a civil penalty issued under the Washington Clean Air Act (RCW
18 70.94.431) is imposed "by a notice in writing either by certified mail
19 with return receipt requested or by personal service, to the person
20 incurring the penalty. . . ."

21 Here, there is no proof of service by certified mail. Thus, the
22 question is whether personal service was made on appellant Ester.
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II

We conclude that the term "personal service" is used in this context in its normally understood legal sense. The requirements of such service are set forth in RCW 4.28.080 and interpreted in cases construing that statutory provision.

The subsection applicable here calls for "delivering" the document served "to the defendant personally or by leaving a copy . . . at the house of his usual abode with some person of suitable age and discretion then resident therein." RCW 4.21.080(14).

In determining whether this statutory formulation has been met, a rule of substantial compliance is applied. Thayer v. Edmonds, 8 Wn. App. 36, 503 P.2d 1110 (1962). The key to substantial compliance is the use of a method of service whereby "actual notice of the pending action will in all probability be accomplished." Thayer at 39.

III

In the Thayer case a process server arrived at a residence slightly before midnight. At that time the householders, though aware of the process server's visit and its purpose, declined to open the door and take physical possession of the papers. They picked them up in front of the house the following morning.

The time that service occurred was critical in Thayer because the applicable statute of limitations had expired at midnight. Under these circumstances, the Court focused on the pre-midnight

1 communications between the process server and the residents and
2 concluded that an alternative to manual delivery had been agreed
3 upon. Substantial compliance with RCW 4.28.080(14) was held to have
4 been accomplished prior to midnight.

5 The timing of service of the notices of civil penalty in the
6 instant case is not similarly important. No critical deadline
7 occurred between the moment the papers were left at the door and the
8 time they were retrieved by the appellant. Under the circumstances we
9 must look at the totality of events, in light of the purpose of
10 imparting actual notice.

11 Here, the appellant, aware that the process server had come and
12 gone, took physical possession of the very papers the process server
13 had left, and then took action based on the actual knowledge gained by
14 the notice these papers imparted. Under these circumstances, we
15 conclude that personal service of the notices of civil penalty was
16 made on October 29, 1988, and that such service, having met the
17 substantial compliance standard, was not legally defective.

18 IV

19 A notice of civil penalty may be appealed to the Pollution
20 Control Hearings Board "if the appeal is filed with the hearing board
21 and served on the [air pollution] authority thirty days after receipt
22 by the person penalized . . ." (emphasis added). RCW 43.21B.300(2).

23 We conclude that "receipt" for the purposes of this requirement
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1 means the date of personal service when personal service has been the
2 method for imposing the penalty. Accordingly, the appeal of the civil
3 penalties at issue had to be filed with this Board and served on
4 PSAPCA within 30 days of October 29, 1988.

5 V

6 The appeals here were timely filed with the Board (November 23,
7 1988). The problem is they were not "served" on PSAPCA. Indeed,
8 PSAPCA had no notice whatsoever that the penalties had been appealed
9 until after the 30 day appeal period had run.

10 Since the effective date of the Ecology Procedures Simplification
11 Act of 1987, which adopted the present language of RCW 43.21B.300(2)
12 (Section 5, Chapter 109, Laws of 1987), we have held that timely
13 receipt of penalty appeals by both this Board and the issuing agency
14 is a jurisdictional requirement. E.g., Universal/Land Construction
15 Co. v. PSAPCA, PCHB No. 87-221 (1987); Field Products, Inc. v. PSAPCA,
16 PCHB No. 88-106 (1988).

17 We adhere to that approach in this case. The statute is not
18 ambiguous. See, Adkins v. Hollister, 47 Wn. App. 381, 735 P.2d 1327
19 (1987).

20 VI

21 Because the requirements by which this Board acquires
22 jurisdiction are unambiguously established by statute, recourse to
23 provisions of the Civil Rules for Superior Court or to any of the
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1 various court rules for appeals is inappropriate in this context.

2 WAC 371-08-031(2) commits this Board to following court rules for
3 pretrial procedure. But, such rules come into play only after the
4 Board's statutory jurisdiction has been properly invoked. Such rules
5 are irrelevant to whether jurisdiction has been acquired in the first
6 place.

7 VII

8 We have not had an occasion to determine what constitutes
9 "service" of a penalty appeal on the issuing agency. See, Tarabachia
10 v. Gig Harbor, 28 Wn. App. 119, 622 P.2d 1283 (1981). Nor have we
11 decided whether the rule of substantial compliance governs the
12 validity of such "service." See, In re Saltis, 94 Wn.2d 889, 621 P.2d
13 716 (1980).

14 However, were we to adopt a substantial compliance approach in
15 this case, appellant would not be helped. So far as the record shows
16 the notices of appeal here never did reach PSAPCA. Even had they been
17 served after the 30 day period, the jurisdictional defect would
18 remain. Substantial compliance must be timely. Adkins v. Hollister,
19 supra.

20 The inconclusive evidence provided by the instructions to the
21 legal messenger is insufficient to establish timely substantial
22 compliance. The instructions, with entries in differing handwriting,
23 lined out words, and no address for PSAPCA, fail to show that actual
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1 notice of the pending action would in all probability be accomplished.

2 When there is a breakdown in communications with a legal
3 messenger, the party requesting service retains the responsibility for
4 meeting jurisdictional requirements. Appellant bears the burden of
5 insuring that service is directed to the proper parties. See, Kain v.
6 Grant County, 47 Wn. App. 153, 734 P.2d 514 (1987).

7 VIII

8 Based on the foregoing, we conclude that the Pollution Control
9 Hearings Board did not acquire jurisdiction over the instant appeal.
10 Accordingly, the Renewed Motion to Dismiss must be granted.

11 The Board does not address the merits of either case.

12 IX

13 Any Finding of Fact which is deemed a Conclusion of Law is hereby
14 adopted as such.

15 From these Conclusions of Law, the Board enters the following
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ORDER

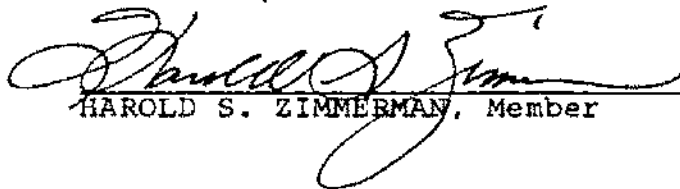
The Renewed Motion to Dismiss is granted. The appeals of PSAPCA Notice and Order of Civil Penalty Nos. 6898 and 6901 by appellant Edward R. Ester are DISMISSED.

DONE this 29th day of November, 1989.

POLLUTION CONTROL HEARINGS BOARD



WICK DUFFORD, Presiding



HAROLD S. ZIMMERMAN, Member